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UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation;
 ORACLE AMERICA, INC., a Delaware
 corporation; and ORACLE INTERNATIONAL
 CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada corporation;
 SETH RAVIN, an individual,

Defendants.

Case No 2:10-cv-0106-LRH-PAL

**PLAINTIFFS ORACLE USA, INC.,
 ORACLE AMERICA, INC., AND
 ORACLE INTERNATIONAL
 CORPORATION'S REPLY IN SUPPORT
 OF MOTION FOR PRESERVATION
 ORDER [REDACTED]**

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I. INTRODUCTION

Oracle's motion seeks an order requiring Rimini to prepare forensic images of the computer hard drives of no more than 60 employees with relevant evidence because such images are necessary to preserve crucial evidence that otherwise will be lost.

It is no answer for Rimini to say it has taken steps to preserve other evidence, such as information on Rimini's servers and email. Oracle has grave concerns about what Rimini has done to preserve that evidence, particularly given Rimini's ever-shifting claims about what measures it has taken. The issue on this motion is whether Rimini has adequately preserved the evidence on its employees' computer hard drives. And there is nothing in Rimini's opposition to show that evidence has been adequately preserved.

For example, Rimini concedes that it failed to take simple, easy steps to preserve instant messages ("IMs") until August 2010, seven months after this lawsuit was filed and nearly two years after Rimini anticipated this lawsuit. Rimini cannot dispute that recovering the IMs that have been deleted before and during this lawsuit will only be possible with forensic images of employee hard drives, and that unless forensic images are taken now, those deleted IMs will be even more difficult – if not impossible – to recover later.

Evidence on individual employee hard drives, of which IMs are but one important example, will be critical. Rimini's central defense in this case is that it has careful safeguards to make sure that Oracle's intellectual property is copied and used only in ways Rimini claims it is permitted to copy and use them. Evidence disproving Rimini's assertions – showing what Rimini employees *actually do* – will be found on Rimini's employees' hard drives. That is particularly true where there are efforts to conceal wrongdoing. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 Rimini repeatedly says that Oracle never asked it to preserve IMs. That is incorrect.
 4 More than a year before this case was filed, and then again three days after this case was filed,
 5 Oracle sent letters to Rimini demanding that Rimini preserve all potentially relevant information,
 6 and Rimini cannot deny that IMs contain such information. Thereafter, Oracle specifically asked
 7 Rimini to preserve “all communications” among Rimini employees about downloading and
 8 copying Oracle software, which obviously includes the very IMs that Rimini failed to preserve.
 9 Rimini knew that it had relevant IMs, and thus Rimini knew it should preserve them.

10 Nor should Rimini be permitted to avoid its obligations by saying it will only live up to
 11 them if Oracle agrees to pay Rimini’s expenses. Oracle has borne the substantial costs of
 12 preserving its own evidence, including forensic images of approximately 200 custodians’
 13 computers. It is Rimini’s obligation to preserve its data, and Rimini’s failure to take other timely
 14 and adequate preservation efforts – such as preserving IMs – makes forensic imaging crucial.
 15 Oracle should not be required to bear the costs of Rimini’s error, particularly by issuing the
 16 blank check Rimini has sought to cover whatever costs Rimini decides to run up.

17 Oracle should not have to pay to make up for Rimini’s failures. However, if the Court
 18 does conclude that some measure of cost-sharing is appropriate, Oracle respectfully submits that
 19 the forensic imaging should be conducted at Oracle’s direction or at the direction of a court-
 20 appointed neutral, to ensure that *these* preservation efforts, at the very least, are adequate and that
 21 Oracle has some control over the costs incurred.

22 **II. ARGUMENT**

23 As shown below, after Rimini anticipated litigation, it failed to take necessary measures
 24 to preserve evidence on individual employee hard drives, including IMs. As a result, files have
 25 already been deleted, and forensic images are a necessary step to preserve what remains of those
 26 files and ensure that additional files are not deleted.

27 **A. Rimini Failed to Take Adequate Preservation Measures**

28 Rimini concedes that probable litigation creates a duty to preserve evidence in advance of

1 suit. (Opp. at 9.) Rimini does not contest any of the facts that show that Rimini saw litigation
2 with Oracle as probable well in advance of this lawsuit’s filing:

- 3 • in December 2008, Rimini threatened Oracle with antitrust claims and Oracle put
4 Rimini on notice of the claims asserted in this action (Mot. at 5);
- 5 • [REDACTED]
- 6 • in September 2009, Ravin represented to this Court that Oracle was preparing
7 litigation against Rimini (*id.* at 6); and
- 8 • after this litigation was filed, Ravin told the press that Rimini “anticipated” this
9 litigation and prepared for it financially (*id.* at 4.)

10 Rimini not only fails to dispute these facts, it fails to even specifically argue that it did not see
11 litigation as probable. Instead, Rimini argues it took adequate measures. (Opp. at 9.) It is wrong.

12 1. Rimini’s “Pre-Suit Document Policies” Are No Substitute for Preservation

13 Rimini argues that, even if it took no affirmative steps to preserve evidence in light its
14 anticipation of this litigation, the Court can trust that documents were preserved because “Rimini
15 has never had a document destruction policy.” (Opp. at 9.) [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] Indeed, even Rimini’s brief, in a backhanded way,
23 concedes that it had no document retention policy: “Rimini documents were and are maintained
24 indefinitely unless a user made the affirmative decision to delete a particular document.” (Opp.
25 at 9.) That is to say, individual users decided what to keep and what to delete. It defies common
26 sense to say that merely because Rimini supposedly did not *require* documents to be destroyed,
27 they never would be. Unless told to do otherwise, many people clean their offices and their
28 computers and get rid of documents and files they think they no longer need – or that might

1 incriminate them or their employer. For this reason, Rimini’s own authorities find a legal hold
 2 notice an indispensable part of preservation. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212,
 3 218 (S.D.N.Y. 2003).

4 Rimini’s own evidence proves the point. Rimini says it does not “auto-delete” emails or
 5 put a limit on the size of employee’s email inboxes. (Opp. at 9.) Thus, Rimini suggests,
 6 employees never have any reason to get rid of emails. But Rimini’s own evidence shows that
 7 they do: since Rimini began taking measures to direct employees to preserve emails for this
 8 case, it reports that “the total volume of stored emails has increased nearly 50 percent over the
 9 last 6 months,” which, according to Rimini, demonstrates that employees are *now* “preserving
 10 potentially relevant emails.” (Dones Decl. ¶ 9.) But the rapid growth of stored emails also
 11 shows that, prior to these measures over the last six months, emails were *not* being preserved.
 12 Rimini’s email experience disproves its claim that so long as a company does not tell its
 13 employees to delete files, they will be preserved.¹

14 The other “pre-suit policies” referenced in Rimini’s opposition likewise do not offer any
 15 assurance that data on employee hard drives was preserved. [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]
 19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 Likewise, Rimini offers no argument why the supposed security restrictions protecting a
 25 certain subset of information on its servers – namely, the stored Oracle software and support

26 ¹ Oracle’s motion is not focused on emails, which Rimini generally stores on servers, but
 27 rather is about any relevant information stored on individual employee hard drives, which may
 28 include emails deleted from the servers.

1 materials located in Rimini's archives (Opp. at 10) – serve as a substitute for different
 2 information on Rimini employees' hard drives that is not preserved.

3 2. The "Spring of 2009" Third-Party Subpoena Memorandum Was Narrow
 4 in Scope and Lacked Any Follow-Up

5 Thus, Rimini is left to rely on a memorandum circulated in the Spring of 2009 that
 6 followed Rimini's receipt of a third-party subpoena in the *SAP TN* action. [REDACTED]

7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED] Yet, in

24 its opposition, Rimini claims that the Spring of 2009 memorandum called for the retention of "a
 25 number of categories of documents that Oracle now contends are relevant to this litigation."
 26 (Opp. at 10.) This typifies Rimini's string of incomplete and inconsistent explanations of what it
 27 has done to preserve evidence. Rimini's repeated inability to provide an accurate,
 28 comprehensive picture of its preservation efforts exacerbates the need for forensic imaging, the

only technique capable of creating a definitive record of what is on employee hard drives and putting an end to the months-long run-around following Rimini's ever-shifting account of what data are preserved and what are not.²

In any event, the Spring of 2009 memorandum is deficient to meet Rimini's preservation obligations in two respects.³ First, the memorandum does not even request that employees preserve all of the information relevant to this lawsuit. To the contrary, as described by Rimini, the memorandum was drafted to preserve evidence responsive to third-party subpoenas issued to Ravin and Rimini. (Ringgenberg Reply Decl. Ex. GG.) The memorandum is narrow as a result.⁴ For example, as described by Rimini, the memorandum sought preservation of "checklists or other documents designed to track the development of . . . tax updates," (Opp. at 10-11) excluding wide swaths of other evidence regarding Rimini's use of Oracle software in its

² Rimini defends its failure to disclose the Spring 2009 memorandum until now by arguing that Oracle's 30(b)(6) deposition only addressed preservation measures taken in this litigation. (Opp. at 11 n. 5.) But the Rule 30(b)(6) notice called for information about "Any steps" taken to "to preserve documents that may be relevant" to this action. (*Id.*)

Rimini cannot invoke the Spring of 2009 memorandum to argue that it timely preserved documents relevant to this action but then attempt to excuse its failure to disclose the notice by also claiming that the Spring of 2009 memorandum did *not* preserve documents relevant to this action.

³ The memorandum is also late, coming months after December 2008, when Rimini threatened Oracle with antitrust litigation and when Oracle put Rimini on written notice of the claims at issue in this litigation and its duty to preserve evidence. (Mot. at 16.)

⁴ When describing the Spring of 2009 memorandum, Rimini's brief quotes the subpoena issued to Rimini nearly verbatim, suggesting that the hold memorandum tracked the subpoenas issued to Rimini and Ravin. The subpoena issued to Ravin focuses on TomorrowNow and SAP, not Rimini, so a memorandum based on that subpoena would not preserve the vast majority of documents relevant to this litigation. The Ravin subpoena mentions Rimini in only two document requests – one asking whether Ravin had recruited any former TomorrowNow employees and one asking for any documents comparing TomorrowNow and Rimini. (Ringgenberg Reply Decl. Ex. GG at 7-8) (Requests 5, 10.) The subpoena issued to Rimini includes only the three document requests listed in Rimini's brief, that is, 1) Rimini's business model, 2) Rimini's use of automated tools to download Oracle software, and 3) checklists designed to track the development, testing, documentation, packaging, or delivery of tax updates. (*Id.* at 32-33.) As explained above, these three requests are far narrower than the issues in this litigation. The memorandum tracking the subpoenas is thus of limited use to Rimini's document preservation efforts related to this litigation.

development of tax updates, and including absolutely nothing about development of non-tax patches and updates. Rimini's description of the memorandum also does not refer to other important categories of information, such as communications among Rimini employees about downloading and copying Oracle software. (*Id.*)

Second, Rimini identifies no meaningful follow-up to the single memorandum. As shown in Oracle's motion and undisputed by Rimini, such "notify and hope" preservation measures fail as a matter of law. *See, e.g., Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008) ("it is not sufficient to notify all employees of a litigation hold and expect the party will then retain and produce all relevant information") (citation omitted); *see also* cases cited in Mot. at 18-19.

Rimini has itself provided quantitative proof that the Spring of 2009 memorandum did not adequately preserve evidence. As noted above, Rimini itself calculated that its implementation of a new hold notice in February of 2010 caused the size of its e-mail stores to grow 50% in six months. (Dones Decl. ¶ 9.) If employees had been preserving relevant evidence since the Spring of 2009, then there would have been no reason for such dramatic growth starting later.

Put simply, starting in at least December 2008, Rimini anticipated this lawsuit, but did not take adequate steps to preserve files on employee hard drives.

3. Rimini's Post-Lawsuit Litigation Hold Likewise Depends on Employee Discretion

Oracle also showed that, even after Rimini was sued in this action and its counsel issued litigation hold notices by emails, Rimini's preservation efforts with regard to data on employee hard drives have depended centrally on the discretion of individual employees. (Mot. at 18.) Rimini says it is "beyond disingenuous to suggest that Rimini's preservation" efforts were "left to the discretion of individual, non-lawyer employees." (Opp. at 11.) Rimini's brief ignores the testimony of its own Rule 30(b)(6) designee on this topic, who was quite clear that Rimini's counsel merely sent two e-mails requesting preservation and hoped employees would comply:

[REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 Rimini attempts to distract the Court from its failure to preserve employees' hard drives
 12 by describing its preservation efforts directed elsewhere, namely a "snapshot" it took of company
 13 email and client archives found on Rimini servers. (Opp. at 12.) But those measures do nothing
 14 to preserve information on employees' hard drives.

15 4. Rimini Admittedly Failed to Preserve Instant Messages

16 Rimini's IMs are a specific example of evidence that Rimini's employees failed to
 17 preserve despite receiving a litigation hold notice supposedly instructing them to preserve all
 18 relevant evidence. Rimini has conceded many employees failed to preserve IMs until at least
 19 August 2010. (Ringgenberg Decl. Ex. R at 2-3.) [REDACTED]
 20 [REDACTED]
 21 [REDACTED] Rimini
 22 nonetheless offers three arguments that it had no obligation to preserve IMs. None has merit.

23 First, Rimini offers an unsupported and factually incorrect argument that preserving IMs
 24 would be burdensome or would require Rimini to *create* documents because IMs are
 25 "ephemeral." (Opp. at 16-17.) Computer scientist Paul Mattal analyzed the instant message tool
 26 used by Rimini employees, "Yahoo! Instant Messenger," and demonstrated that instant messages
 27 can be preserved with the mere click of a mouse by simply selecting "Yes, save all of my
 28

1 messages.” (Mattal Aff. Ex. 2.) [REDACTED]

2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED] In August, Rimini agreed to start
 5 preserving IMs, and has offered no technical or practical reason for failing to do so previously.
 6 Mattal also demonstrated that the IMs used by Rimini are not “ephemeral.” Rather, in the
 7 default configuration of the application, IMs are saved to a user’s hard drive and then deleted.
 8 (Mattal Aff. ¶¶ 9-11.) Preservation of IMs in this circumstance would not require the creation of
 9 any new document; it just requires that documents that already exist on the hard drives not be
 10 deleted.

11 Second, Rimini’s claim that Oracle never asked Rimini to preserve IMs is wrong. On
 12 December 23, 2008, Oracle broadly notified Rimini of its obligation to preserve “all documents”
 13 and “electronic records” that relate to the claims asserted in this case. (Ringgenberg Decl. Ex. F
 14 at 4.) Three days after this case was filed, Oracle reiterated its demand regarding Rimini’s
 15 preservation obligations. (*Id.* Ex. J.) And, in response to a request by Rimini to specify relevant
 16 materials, on March 22, 2010, Oracle requested that Rimini preserve all “communications
 17 between Rimini Street employees concerning the downloading or copying of any Oracle
 18 software and support materials.” (*Id.* Ex. M at 2.) That plainly includes IMs between Rimini
 19 employees. After Oracle learned at the August 12 Rule 30(b)(6) deposition that Rimini was not
 20 preserving IMs, Oracle demanded the next day that Rimini begin to do so. (*Id.* Ex. EE at 2-3.)⁵

21 Third, Rimini fails in its effort to find caselaw establishing IMs as somehow beyond the
 22 scope of preservation or discovery. Rimini’s authorities are inapposite; most address the
 23 preservation of data that, unlike Rimini’s IMs, require far more than just a few clicks to preserve.

24 _____
 25 ⁵ In any event, what Oracle asked for is beside the point. Rimini, not Oracle, has
 26 information about the tools that its employees use to communicate, and it is Rimini’s obligation
 27 to understand and preserve its own data. [REDACTED]
 28 [REDACTED]

1 *See Malletier v. Dooney & Bourke, Inc.*, No. 04 Civ. 5316, 2006 WL 3851151, at *2 (S.D.N.Y.
 2 Dec. 22, 2006) (chat room programs that used a technology that “did not provide a ready means
 3 for retaining such communications”); *Convolve v. Compaq Computer Corp.*, 223 F.R.D. 162,
 4 177 (S.D.N.Y. 2004) (“preservation of the wave forms in a tangible state would have required
 5 heroic efforts”).⁶ In fact, courts have repeatedly recognized the importance of preserving and
 6 producing relevant IMs. *See, e.g., Passlogix, Inc. v. 2FA Technology, LLC*, ___ F. Supp. 2d ___,
 7 No. 08 Civ. 10986, 2010 WL 1702216, at *31 (S.D.N.Y. Apr. 27, 2010) (finding that defendants
 8 breached their duty to preserve documents by not preserving instant messages sent using Skype
 9 program); *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-MD-1840, 2009 WL
 10 3045718, at *3 n.22, *4 (D. Kan Sept. 21, 2009) (ordering production of relevant IMs); *Swofford*
 11 *v. Eslinger*, 671 F. Supp. 2d 1274, 1284 (M.D. Fla. 2009) (imposing sanctions for destroying
 12 laptop containing incriminating instant message conversation); *Quotient, Inc. v. Toon*, No. 13-C-
 13 05-64087, 2005 WL 400649, at *3 (Md. Cir. Ct. Dec. 23, 2005) (ordering forensic image of
 14 defendant’s hard drive to preserve instant messages).

15 5. Rimini’s Collection for Production Is Not a Substitute for Preservation

16 Finally, Rimini relies on its collection of documents from 30 custodians for production as
 17 a substitute for preservation efforts. (Opp. at 12-13.) But that does nothing to preserve *any*
 18 documents from its remaining 170 employees. And Rimini has yet to demonstrate that its
 19 collection procedure sufficiently preserved even those 30 employees’ data. Rimini does not say
 20 what types of data were collected, whether counsel collected any metadata or ensured that the
 21 metadata was not altered during collection. (Dones Decl. ¶ 19.) Rimini does not contend that
 22 counsel collected any IMs. (*Id.*) And Rimini provides no detail regarding the preservation
 23

24 ⁶ Another order cited by Rimini was the result of a stipulation and reflects no judicial
 25 determination. Case Management Order No. 11, *In re Yasmin and Yaz (Drospirenone) Mktg.,*
 26 *Sales Practices and Prods. Liab. Litig.*, No 3:09-md-02100, at *2 (S.D. Ill. Feb. 18, 2010). And
 27 in *Children’s Legal Services v. Kresch*, No. 07-cv-10255, 2007 WL 4098203 (E.D. Mich. Nov.
 28 16, 2007), the court denied an entire production request in which instant messaging usernames
 was just one item requested.

1 instructions that counsel gave to these 30 employees. (*Id.* ¶¶ 18-19.)

2 **B. Forensic Images Are a Necessary and Reasonable Preservation Measure**

3 Forensic imaging is the most effective way to ensure preservation of information,
4 including deleted IMs and other deleted files, on Rimini's employees' computers. Rimini does
5 not dispute this. Instead, Rimini incorrectly asserts that the burden would outweigh the benefit.

6 1. The Benefit of Forensic Images Would Be Substantial

7 Here, forensic images of Rimini's computers are critical. Oracle alleges that Rimini
8 downloads Oracle software and support materials in an indiscriminate manner without regard for
9 what Rimini's customers are licensed to use. (FAC ¶¶ 6, 8, 42.) Oracle also alleges that once
10 Rimini does this, it cross-uses software obtained on one customer's behalf for the benefit of other
11 customers, in violation of the customer's license agreements with Oracle. (*Id.* ¶¶ 59, 76.)

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] Forensic images of those
19 hard drives will preserve what files exist, including any files deleted by employees (whether in
20 good faith or to conceal wrongdoing) to the extent such files still remain.

21 Rimini's assertion (Opp. at 10, 12) that it has preserved the end result of these processes,
22 *i.e.*, the downloaded materials in customer folders in a read-only format, is wholly inadequate.
23 Oracle's allegations of improper downloading and impermissible cross-use relate directly to how
24 the software got there. Forensic images of relevant hard drives, if the underlying data has not
25 been already destroyed, should have the electronic footprints showing Rimini's steps. [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED] The preservation of electronic evidence thus takes on a heightened
 4 importance because historical, deleted, overwritten, edited, or transferred data is highly relevant
 5 to the litigation. *See, e.g., Genworth Fin. Wealth Mgt., Inc. v. McMullan*, 267 F.R.D. 443,
 6 448 (D. Conn. 2010) (“[t]here is a sufficient nexus between Genworth’s claims and its need to
 7 obtain a mirror image of the computer’s hard drive, warranting the imaging requested by the
 8 Plaintiff”).

9 Rimini’s cases are in accord: forensic imaging is warranted where computer evidence is
 10 likely relevant. *See, e.g., Balboa Threadworks, Inc. v. Stucky*, No. 05-1157, 2006 WL 763668, at
 11 *4 (D. Kan. Mar. 24, 2006) (noting that “because the alleged infringement in this case is claimed
 12 to have occurred through the use of computers to download copyrighted material, the importance
 13 and relevance of computer evidence is particularly important”); *Antioch Co. v. Scrapbook*
 14 *Borders, Inc.*, 210 F.R.D. 645, 651-53 (D. Minn. 2002) (granting plaintiff’s motion for forensic
 15 imaging and inspection of defendants’ hard drives and noting that “it is a well accepted
 16 proposition that deleted computer files, whether they be e-mails or otherwise, are discoverable”);
 17 *see also Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641 (S.D. Ind. 2000)
 18 (ordering forensic inspection of relevant computers); *Playboy Enterprises, Inc. v. Welles*, 60 F.
 19 Supp. 2d 1050, 1054-55 (S.D. Cal. 1999) (same).⁷

20 Of course, “compelled forensic imaging is not appropriate in all cases.” *John B. v. Goetz*,
 21 531 F.3d 448, 460 (6th Cir. 2008). But the specifics of this case establish that imaging is not just
 22 “appropriate,” but necessary, given the importance of the data and Rimini’s failures to preserve
 23 data found only on individuals’ hard drives. *See Treppel*, 249 F.R.D. at 124 (ordering forensic
 24 inspection of inadequately preserved hard drive). As shown above, Rimini failed since at least

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 26 ⁷ The string cite Rimini lists in a footnote simply demonstrates that forensic imaging is
 27 warranted where the requesting party demonstrates a need for forensic images. (Opp. at 14 n.8.)
 28 The paramount importance of ESI to the subject matter of this case and the evidence that Rimini
 has not adequately preserved ESI on employees’ hard drives demonstrates such a need.

December 2008 to take adequate steps to ensure that employees preserved evidence on their hard drives, making inevitable the deletion of relevant evidence. [REDACTED]

[REDACTED] But Rimini failed to ensure that IMs in this case were preserved. Deleted IMs and other deleted files now sit on Rimini's employees' hard drives, at risk of being overwritten every day by new files. (Mattal Aff. ¶¶ 5, 12.) Forensic imaging will protect absolutely the files that remain on those hard drives, including what is left of those deleted IMs and other deleted files, making them available for recovery. Without forensic images, other files will be deleted, and files already deleted are likely to be gone forever.

This is not a mere "fishing expedition" or some effort to "unleash every new technology...to try and find information," as Rimini suggests. (Opp. at 21-22.) This is an effort to preserve basic data relevant to Oracle's claims that, because of Rimini's failures, may now be preserved only through forensic imaging. Where "there is simply no other way in which to seek this information," forensic imaging is warranted. *Covad Comm'ns Co. v. Revonet, Inc.*, 258 F.R.D. 5, 13 (D.D.C. 2009).

2. The Burden Would Not Be Undue

Rimini's opposition asserts that forensic imaging could cost up to \$200,000. This is grossly exaggerated in at least two respects. First, Oracle does not ask that Rimini image each of its 200 employees' computers. Oracle has proposed that the parties agree on 60 custodians per side from which to produce documents, and the parties are conferring regarding the number and identify of custodians. Oracle only seeks forensic imaging of the same individuals.

Second, Rimini's estimate of the costs per computer is substantially overstated. [REDACTED]

[REDACTED] As the declaration of an experienced computer forensics technician demonstrates, [REDACTED]

[REDACTED] Where the subjects are far-flung, the imaging can be conducted remotely, and this

1 process can be conducted overnight, avoiding interrupting the employee's use of the computer
 2 during business hours. (Cheng Decl. ¶¶ 8, 11.) [REDACTED]

3 [REDACTED]
 4 [REDACTED] in line with the estimate provided by Oracle that 50 computers could be
 5 imaged for as little as \$10,000 and no more than \$25,000. (Cheng Decl. ¶¶ 8-12.) Such an
 6 expense is hardly unreasonable given Rimini's size, revenues, and the magnitude of the issues at
 7 stake – including whether Rimini's business model is fundamentally legal.

8 Rimini also asserts that the costs of imaging "pale in comparison" to the costs of
 9 reviewing such documents for privilege and relevance. (Opp. at 19.) But Oracle has only asked
 10 Rimini to create and *preserve* forensic images to ensure that no more data is lost, not, at this
 11 stage, to *produce* forensic images. *See Covad*, 258 F.R.D. at 9 (distinguishing between a request
 12 for the creation of forensic images and a more intrusive request for a forensic inspection). The
 13 case Rimini cites to demonstrate that forensic imaging is burdensome actually addresses the
 14 more time-consuming request for forensic investigation of forensic images, not just preparation
 15 of the image itself. *See Powers v. Thomas M. Cooley Law Sch.*, No 5:05-cv-117, 2006 WL
 16 2711512, at *5 (W.D. Mich. Sept. 21, 2006).

17 It is premature for the parties or the Court to determine what searching and analysis of the
 18 forensic data should be undertaken because the parties are just now completing the foundational
 19 discovery period. After Oracle receives and is able to digest additional documents and data, the
 20 need for any forensic analysis and its appropriate scope will be more clear. But it is important
 21 that the forensic evidence be *preserved* now, for otherwise relevant information that may be
 22 needed will be lost and irretrievable.

23 C. Rimini Should Bear the Costs of Forensic Imaging

24 Finally, Rimini makes much of its supposed "compromise" in which Rimini would
 25 control forensic imaging of its computers but Oracle would foot the bill. (Opp. at 1.) Rimini's
 26 approach would reverse our litigation system's basic presumption that the producing party bears
 27 the cost of production. *See Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 317 (S.D.N.Y.
 28 2003) (further noting that "[a]ny principled approach to electronic evidence must respect that

presumption”). Such cost-shifting is not appropriate unless discovery imposes an “undue” burden. Fed. R. Civ. P. 26(c). As explained above, forensic imaging imposes no undue burden here, and cost shifting is thus inappropriate.

Rimini also overlooks that forensic imaging is necessary here because of its own failure to preserve its employees’ hard drives and to timely discuss its preservation efforts. Where a defendant has “failed to take adequate measures to prevent the destruction of discoverable materials,” courts have permitted the plaintiff to conduct a forensic *search* – not just imaging – of the relevant computer at defendants’ expense. *Treppel*, 249 F.R.D. at 124. For example, in *Genworth Fin. Wealth Mgt., Inc. v. McMullan*, 267 F.R.D. 443 (D. Conn. 2010), the court ordered defendants to pay for a forensic investigation because of defendants’ failure to preserve “relevant information, that the Defendants were required to maintain and preserve, [which] necessitates the retention of a neutral forensic expert to ascertain what, if any, data existed on any and all computer and electronic storage devices to which the Defendants had access during the relevant time period.” *Id.* at 448.⁸ Shifting the costs of forensic imaging or inspection to the receiving party is not appropriate where the producing party’s failure to adequately preserve evidence created the need for forensic imaging in the first place. *See, e.g., Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-CV-20424, 2009 WL 982460, at *17 (S.D. Fla. Apr. 9, 2009) (allowing forensic examination at producing party’s expense because of discovery failings).

III. CONCLUSION

For the reasons expressed above, Oracle respectfully requests that the Court enter Oracle’s Proposed Preservation Order.

⁸ The *Genworth* court apportioned 80% costs of the forensic inspection to defendants and 20% to plaintiffs. Because Oracle has asked for the less burdensome measure of forensic imaging, no such cost-shifting is necessary here.

1 DATED: September 3, 2010

BOIES SCHILLER & FLEXNER LLP

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3 By: /s/ Kieran P. Ringgenberg
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5 Attorneys for Plaintiffs
6 Oracle USA, Inc., Oracle America, Inc.,
7 and Oracle International Corp.
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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2010, I electronically transmitted the foregoing **PLAINTIFFS ORACLE USA, INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION'S REPLY IN SUPPORT OF MOTION FOR PRESERVATION ORDER [REDACTED]** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel in this matter; all counsel being registered to receive Electronic Filing.

/s/ Catherine Duong

An employee of Boies, Schiller & Flexner LLP